Supreme Court, U.S.
FILED
AUG 3 - 1995

No. 95-196

In The

Supreme Court of the United States

October Term, 1995

HENRI COURIER DE MERE,

Petitioner,

vs.

ISHWAR D. JAIN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When presented with a petition to compel arbitration under Chapter 2 of the Federal Arbitration Act, does a United States District Court have authority to compel arbitration within its own district between two foreign citizens if the parties' arbitration agreement does not specify a location for arbitration and the district court does not have jurisdiction over the parties' underlying dispute?

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Henri Courier de Mere respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. C, *infra*, 5a-17a), is reported at 51 F.3d 686 (7th Cir. 1995). The memorandum opinion of the United States District Court for the Northern District of Illinois, Eastern Division (App. F, *infra*, 25a-29a), is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on April 3, 1995 (App. B, *infra*, 3a-4a), and denied a Petition for Rehearing, and a Suggestion of Rehearing *in banc*, on May 5, 1995 (App. A, *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. §§ 4, 203, 204, 206 and 208 are set forth *verbatim* at Appendix G (*infra*, 32a-34a).

STATEMENT OF THE CASE

This petition raises a fundamental question concerning the authority of a United States District Court, under Chapter 2 of the Federal Arbitration Act (the "FAA"), to compel arbitration within its district between two individual foreign citizens, where the parties have not agreed to arbitrate there, and where the district court does not have jurisdiction over the subject matter of the parties' underlying contract dispute.

Chapter 2 of the FAA (9 U.S.C. §§ 201 *et seq.*) codifies the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and controls the enforcement of commercial arbitration agreements involving foreign parties or interests. District courts having jurisdiction pursuant to § 203 over a petition to compel arbitration may direct that arbitration between the parties be held at any place specified in the parties' agreement, as provided in § 206. However, § 206 does not grant district courts authority to compel arbitration where the parties' agreement does *not* specify a location for arbitration.

The provisions of Chapter 1 of the FAA (9 U.S.C. §§ 1 *et seq.*), governing the enforcement of domestic arbitration agreements, are incorporated into Chapter 2, via § 208, to the extent the former do not conflict with the latter. Under Chapter 1, § 4, a district court "which, save for the arbitration agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties" *must* compel arbitration within its own district if the parties' agreement does not specify a location for arbitration. Accordingly, a district court faced with a Chapter 2 proceeding in which the parties failed to specify a site for arbitration may find authority in § 4, via § 208, to compel arbitration within its own district, if it would have jurisdiction under Title 28 over the subject matter of the parties' underlying dispute. In such a case, § 206 and § 4 do not conflict.

In contrast, this case of first impression presents a district court faced with a petition to compel arbitration under Chapter 2, where two individual foreign citizens have not specified a location for arbitration, and where the district court does *not* have jurisdiction under Title 28 over the subject matter of the parties' underlying contract dispute. The United States Court of Appeals for the Seventh Circuit held that in such a situation, a district

court can nonetheless glean authority to compel arbitration within its district from § 4, via § 208. This conclusion can only be reached by ignoring the jurisdictional limitations plainly set forth in § 4, and to do so is contrary to the provisions of Chapter 2, contrary to the fundamental principles of statutory construction, and contrary to sound public policy.

A. The Parties and the Underlying Controversy

Petitioner Henri Courier de Mere ("de Mere") is a citizen of France. Ishwar D. Jain ("Jain") is a citizen of India. De Mere is the inventor and owner of certain patents pertaining to electronic ballasts, transformers and power supply devices.

On November 12, 1992, in Mettray, France, Jain and de Mere entered into a written agreement providing, in part, that Jain assist de Mere in marketing de Mere's technology. The contract anticipated Jain receiving compensation for his efforts based upon a percentage of de Mere's receipts. Paragraph 10 of the contract between Jain and de Mere provides as follows:

> 10. Any disagreement arising out of this contract may only be presented to an arbitrary commission applying the French laws.

The provision is silent as to the location of the arbitration and the method of appointment of the arbitrator.

On August 25, 1993, de Mere entered into a license agreement with Motorola Lighting, Inc. of Buffalo Grove, Illinois. The license agreement between de Mere and Motorola Lighting, Inc. provided for certain royalty payments to de Mere. Disputes arose between Jain and de Mere concerning Jain's entitlement to compensation under the November 12, 1992 contract.

On March 18, 1991 Jain delivered to de Mere a Demand for Arbitration under the Commercial Arbitration Rules of the American Arbitration Association, seeking arbitration in Chicago, Illinois. De Mere objected to the jurisdiction of the AAA, and to arbitrating in Chicago.

B. Course of Proceedings

On July 18, 1994, Jain filed an Amended Petition to Appoint Arbitrator and Compel Arbitration, asserting jurisdiction under 9 U.S.C. § 203, and venue under 9 U.S.C. § 204. On August 22, 1994, Judge Zagel of the United States District Court for the Northern District of Illinois issued a Memorandum Opinion and Order denying Jain's Petition. (App. F, *infra,* 25a-31a). Judge Zagel determined that:

> . . . while Chapter 2 [of the FAA] does confer jurisdiction, it does not permit me to compel arbitration in this case. Chapter 2 permits courts to compel arbitration "only in accordance with the [arbitration] agreement at any place therein provided for." 9 U.S.C. § 206. The agreement between Jain and de Mere contains no such provision and, therefore, cannot be enforced under Chapter 2.

Judge Zagel further held that he could not derive authority to compel arbitration from Chapter, 1, § 4 of the FAA because:

> . . . Chapter 1 limits the power to compel arbitration to cases where the court has an independent basis for jurisdiction "in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between

> the parties," 9 U.S.C. § 4. None has been established here. There is certainly not diversity; foreign citizens who reside abroad are not diverse for jurisdictional purposes.

(App. F, *infra*, 28a-29a).

On September 2, 1994, Judge Zagel denied Jain's Motion for Reconsideration (App. D, *infra*, 18a), ruling that the authority of § 206 of Chapter 2 is limited, and that § 206 requires a specified site for arbitration before a district court can compel arbitration between foreign parties. Judge Zagel adhered to his prior ruling that § 4 of Chapter 1 does not compel the district court to order arbitration in this case because:

> . . . [t]he same section of Chapter 1 [which] authorizes a court to compel arbitration in its own district, also predicates authority to compel arbitration at all and [sic] having jurisdiction over the underlying dispute. Jain has never even attempted to demonstrate that here.

(App. E, *infra*, 21a).

Jain appealed to the United States Court of Appeals for the Seventh Circuit, which reversed the decision of the district court and remanded the case. (App. B, *infra*, 3a-4a). The appellate court held that:

> Section 208 [of Chapter 2] requires the incorporation of chapter 1 provisions to the extent they do not conflict with Chapter 2 or the Convention, and the jurisdictional restrictions of § 4 appear to conflict with the

> jurisdictional grants of §§ 202 and 203 in international commercial arbitration disputes. Consequently, while the provisions of § 4 allowing a court to order arbitration in its own district should apply to an action under chapter 2, its jurisdictional limits should not.

(App. C, *infra*, 14a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONSTITUTES AN IMPROPER EXERCISE OF JUDICIAL LEGISLATION, SO FAR DEPARTING FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

In its opinion below, the appellate court expressed concern that "given that the court is properly seized of this action, it should not then be left helpless to enforce the arbitration agreement." (App. C, *infra*, 14a). The decision of the appellate court reveals its uneasiness with the proposition that the district court may have jurisdiction over Jain's petition to compel arbitration under § 203 of the FAA, but does not have the power to enforce the arbitration agreement under § 206 or § 4. However, in the situation where two purely foreign parties fail to specify a site for arbitration, Chapter 2 unambiguously dictates that result. That the appellate court may question the wisdom of that result

does not justify its improper exercise of judicial legislation, under the guise of statutory construction.

A. The Decision Of The Appellate Court Ignores, Is Contrary To, And Improvidently Attempts To Rewrite The Plain Language Of § 208 Of The Federal Arbitration Act.

Chapter 2, § 208 of the FAA incorporates the provisions of Chapter 1 into Chapter 2 to the extent there is no conflict between them. The appellate court expressly noted the conflict between the jurisdictional limitations of § 4 and the jurisdictional grants of § 202 and § 203. (App. C, *infra,* 14a). The inquiry should end there under the plain language of § 208, for in determining the scope of a statute the court should look first to its language. *Reves v. Ernst & Young,* 13 S. Ct. 1163 (1993). Nevertheless, in an apparent effort to circumvent the identified conflict between Chapter 1 and Chapter 2, the appellate court improperly separated that portion of § 4 allowing a court to compel arbitration in its own district from the jurisdictional limitations contained in the very same paragraph. In construing a statute, a court must not be guided by a single sentence or phrase, but must look to the provisions of the whole statute. *Kelly v. Robinson,* 479 U.S. 36 (1986). The appellate court violated the scope of its judicial authority by rewriting § 4 in an effort to "create" consistency. It is not within the province of a court, in the course of construction of a statute, to make legislation. *United States v. First National Bank,* 234 U.S. 245 (1914).

B. The Decision Of The Appellate Court Seeks To Judicially Circumvent The Unambiguous Legislative Intent Of Chapter 2 Of The Federal Arbitration Act.

The appellate court perceives an anomaly in the district court's inability to enforce an arbitration agreement while it has jurisdiction over the petition to compel arbitration pursuant to

§ 203 . Yet Chapter 2 anticipates that very result where, as in the instant case, the district court does not *also* have jurisdiction over the underlying dispute between the parties. Section 204, the venue provision of Chapter 2, provides as follows:

> An action or proceeding over which the district courts have jurisdiction pursuant to Section 203 of this title may be brought in any such court in which *save for the arbitration agreement* an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

(Emphasis added). This provision substantially mirrors the jurisdictional limitations of § 4, and effects the very same result: while § 203 confers jurisdiction over a Chapter 2 proceeding by virtue of the existence of an arbitration agreement, § 204 precludes it from being brought in any district court that does not have independent jurisdiction over the underlying controversy, unless the parties contractually agreed otherwise. The very result that the appellate court endeavors to avoid is sanctioned by the provisions of Chapter 2 itself.

Accordingly, where parties fail to specify a site for arbitration, Congress intended to preclude one party from availing himself of a United States district court to compel the other to arbitrate unless the district court has an independent basis for jurisdiction over the parties' underlying dispute. A judicial perception that the result in a particular case would be unreasonable does not justify disregard of what Congress has plainly and intentionally provided. *Commissioner v. Asphalt*

Products Co., 482 U.S. 117 (1987). The appellate court disregarded the import of § 204 in this case, despite noting that:

> Jurisdiction in this case also rests solely on chapter 2. Because both are foreigners, Jain and de Mere are not diverse parties for the purposes of 28 U.S.C. § 1332, and Jain's royalty claim raises no federal question beyond arbitration. Chapter 2 thus demarcates the beginning and the end of our authority in this case.

(App. C, *infra*, 8a).

C. The Decision Of The Appellate Court Is An Improper Expression Of Judicial Discontent With Unambiguous Legislation.

The appellate court opines that in the circumstance where parties fail to specify a site for arbitration, ". . . § 4 and § 206 conflict only if one assumes that Congress intended § 206 to be the exclusive method by which courts could order arbitration." (App. C, *infra*, 11a). The appellate court assumes that such exclusivity was *not* Congress' intent because then ". . . courts would have less power to enforce arbitration agreements in international cases than in domestic ones whenever the agreement fails to stipulate an arbitration location." *Id.*

The appellate court grossly overstates the perceived problem because it only arises in the specific instance where the agreement fails to stipulate an arbitration location *and* where the district court does not have jurisdiction over the underlying dispute. Practically speaking, this will probably occur only where, as here, the dispute involves entirely foreign parties, and one seeks arbitration in the United States. As set forth above, the

unambiguous language of Chapter 2 mandates the result in such a case: a district court does have not authority to compel the parties to arbitrate. The Supreme Court should not lightly assume that Congress intended a statute to have incongruous results, but if compelling language produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language. *Potomac Electric Power v. Director, Office of Workers' Compensation Programs, et al.*, 449 U.S. 268 (1980). The fact that statutory language leads to seemingly unjust results in particular cases does not give judges a license to disregard it. *Id.*

The appellate court also assumes that "the absence of any explicit statement making § 206 exclusive", combined with the strong presumption in favor of arbitration, renders § 4 "clearly applicable when an arbitration agreement fails to specify a place for arbitration." (App. C, *infra*, 11a). To construe § 206 as not exclusive because Congress did not say it is exclusive is to charge Congress with failing to legislate away all negative implications. In fact, The United States Supreme Court has a duty to refrain from reading a phrase into a federal statute when Congress has left the phrase out. *Keene Corp. v. United States*, 113 S. Ct. 2035 (1993). It is therefore more reasonable to assume that had Congress intended in drafting Chapter 2 to provide district courts a mechanism by which to remedy the failure of foreign parties to specify a site for arbitration, it would have provided such a mechanism. Similarly, if Congress intended to relax the jurisdictional mandate of § 4 for the purpose of incorporation into Chapter 2, it would have specifically provided. It can be presumed that Congress acted intentionally and purposefully in the disparate inclusion or exclusion of statutory language. *Keene Corp.* at 2040.

Despite the Federal Arbitration Act's underlying policy in favor of arbitration, Congress must be presumed to be aware that it left one foreign party powerless to compel another foreign party

to arbitrate in the United States where there is no agreement to arbitrate here, and where the district courts do not have subject matter jurisdiction over the parties' underlying dispute. That conclusion is fairly reached by a plain reading of the provisions of Chapter 2, even without resort to § 4. It is the only conclusion that harmonizes the policy evident in the venue provisions of § 204 with the jurisdictional mandate of § 4. The United States Court of Appeals for the Seventh Circuit may not agree with Congress, but it is duty bound to apply its unambiguous legislative enactments.

II.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

The appellate court appropriately noted the general policy favoring enforcement of international arbitration agreements, as advanced by Chapter 2's codification of the Convention on the Recognition and Enforcement of Arbitral Awards. (App. C, *infra,* 8a, 11a). It is Congress, however, that has the constitutional authority to define the jurisdiction of the lower federal courts. *Keene Corp. v. United States,* 113 S. Ct. at 2040. Accordingly, the appellate courts are bound to advance the enforcement of international arbitration agreements only within the scope of the authority Congress expressly conferred upon them.

Numerous federal decisions have grappled with Chapter 2 petitions to compel arbitration where the parties' agreements failed to specify a site for arbitration, and they have invariably relied on § 4 to conclude that the district court could compel arbitration within its district. (App. C, *infra,* 13a). In every one of

those cases, however, "there was actually diversity of citizenship cognizable under 28 U.S.C. § 1332." *Id.* Accordingly, the district courts overcame the jurisdictional limitations of § 4, and those decisions are of little import here.

In support of his petition to compel in the district court, and in his appeal, Jain relied heavily on the decision in *Oil Basins Ltd. v. Broken Hill Proprietary Co.*, 613 F. Supp. 483 (S.D.N.Y. 1985). That case is factually similar to the instant one in that two foreign litigants (a Bermudian and an Australian corporation, respectively) failed to specify a location in their arbitration agreement, and one sought arbitration in the United States. The appellate court in *Oil Basins* relied on § 4 to compel arbitration in New York. However, as the appellate court here noted:

> *Oil Basins* does present a scenario almost identical to the instant case. Yet in *Oil Basins*, as in these other cases, the defendants sought an expansive reading of § 206 rather than a restrictive reading of § 4. Both parties in *Oil Basins* wanted the court to compel arbitration, and it was only a matter of where that arbitration should occur. *Oil Basins*, therefore, did not directly address the issue de Mere raises.

(App. C., *infra*, 13a). Additionally, although not addressed by the appellate court, the *Oil Basins* decision specified without further explanation, that "jurisdiction is based upon 28 U.S.C. § 1331 and 9 U.S.C. § 203". *Oil Basins* at 485. The court in *Oil Basins* at least assumed jurisdiction under Title 28 in the subject matter of the underlying dispute, which would justify its reliance on § 4 to compel arbitration.

It should also be noted that the final resolution of the *Oil Basins* case was the grant of the defendant's motion to reopen and motion for dismissal on the grounds of *forum non conveniens*. *Oil Basins* at 488-491. (App. C, *infra*, 13a, n.2). It is reasonable to assume that *forum non conveniens* issues will arise with regularity in cases where purely foreign litigants are involved. Would it advance the policy behind the FAA, or serve the best interests of the United States judiciary, to exercise authority over parties and disputes that are ultimately better served and more properly before a foreign tribunal?

The decision of the appellate court below also extends an invitation to foreign parties who fail to specify a site in their arbitration agreements to shop for the United States forum most convenient for them, as the mere existence of an international arbitration agreement is their ticket into a district court. Even more repugnant is that the eventual choice of forum would go to the party winning the race to file his petition first.

CONCLUSION

No reported case addresses the unique circumstance presented in this petition. The full scope of a district court's authority to act under Chapter 2 of the FAA is accordingly undefined, and the decision of the United States Court of Appeals for the Seventh Circuit is of questionable propriety. This petition offers the Supreme Court the opportunity to apply sound judicial interpretation, rather than legislation, to finally decide what is apparently the last remaining question concerning the authority of the United States district courts to compel arbitration under Chapter 2 of the FAA.

Petitioner requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MAY 5, 1995 DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 5, 1995

HON. HARLINGTON WOOD, JR., Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

HON. FRANK H. EASTERBROOK, Circuit Judge

No. 94-3314

ISHWAR D. JAIN,

Plaintiff-Appellant,

v.

HENRI COURIER DE MERE,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 94 C 3388

James B. Zagel, Judge.

Appendix A

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause on April 17, 1995, by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in banc* be, and the same is hereby DENIED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED APRIL 3, 1995 REVERSING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION AND REMANDING THE CASE ACCORDINGLY

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: April 3, 1995

BEFORE: Honorable Harlington Wood, Jr., Circuit Juge

Honorable Joel M. Flaum, Circuit Judge

Honorable Frank H. Easterbrook, Circuit Judge

No. 94-3314

ISHWAR D. JAIN,
Plaintiff-Appellant

v.

HENRI COURIER DE MERE,
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 94 C 3388, James B. Zagel, Judge

Appendix B

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered on this date.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SEVENTH CIRCUIT DATED APRIL 3, 1995

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-3314

ISHWAR JAIN,

Petitioner-Appellant,

v.

HENRI COURIER DE MÉRÉ,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 3388—**James B. Zagel**, *Judge*.

ARGUED FEBRUARY 15, 1995—DECIDED APRIL 3, 1995

Before WOOD, JR., FLAUM, and EASTERBROOK, *Circuit Judges*.

FLAUM, *Circuit Judge*. This case presents an issue of first impression: whether federal courts have power to compel arbitration between two foreign nationals where their arbitration agreement fails to specify a location for the arbitration or a method of choosing arbitrators. We

hold that federal courts have this power and therefore reverse the decision of the district court.

I.

Henri Courier de Méré, a citizen of France, owns a number of patents pertaining to electronic ballasts for fluorescent and gas discharge lamps that he invented. De Méré signed a contract with Ishwar D. Jain, a citizen of India, whereby Jain agreed to help market these inventions. The contract between de Méré and Jain provides that "Any disagreement arising out of this contract may only be presented to an arbitrary commission applying French laws." The contract is silent as to the location of the arbitration and the method of appointment of the arbitrator.

On August 25, 1993, de Méré entered into a license agreement with Motorola Lighting, Inc. of Illinois. This agreement, which Jain had helped promote and negotiate in Illinois, provided for certain royalty payments from Motorola to de Méré. According to the marketing contract, De Méré then paid Jain $25,000, ten percent of the first advanced royalty payment from Motorola. Jain believes that the marketing contract also entitles him to a percentage of other money Motorola has paid de Méré; de Méré disagrees and has refused to give Jain anything beyond the $25,000.

Pursuant to the contract, Jain served de Méré with a demand for arbitration on March 18, 1994. Jain sought arbitration in Illinois under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), and the AAA designated an arbitrator and scheduled a hearing for July 25-26, 1994. De Méré objected to the appointment of the AAA as the arbitrary commission and to its selection of an arbitrator. De Méré contended that

the only appropriate jurisdiction under the contract lay in France.

Jain petitioned the District Court for the Northern District of Illinois to compel arbitration in Illinois. The district court held that it had jurisdiction under the Federal Arbitration Act (the "Act"), 9 U.S.C. § 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 21 U.S.T. 2517, but ruled that the Act did not permit it to compel arbitration in this case. The court determined that the contract's failure to specify either the location of the arbitration or the method of appointing an arbitrator left it powerless to enforce the arbitration agreement between de Méré and Jain. After the district court denied a motion for reconsideration, this appeal followed.

II.

Jain contends that the district court incorrectly determined that it could not compel arbitration in this case. Specifically, Jain asserts that 9 U.S.C. §§ 4 & 5, which empower a district court to compel arbitration in its own district and to appoint an arbitrator, give the district court all the authority it needs to refer the case to arbitration in the Northern District of Illinois. We review this question of statutory interpretation *de novo*. *United States v. Holloway*, 991 F.2d 370, 372 (7th Cir. 1993).

The Federal Arbitration Act governs the enforcement, validity, and interpretation of arbitration clauses in commercial contracts in both state and federal courts. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115 S.Ct. 834, 837-39 (1995); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). Chapter 2 of the Act, 9 U.S.C. §§ 201-208, which implements the Convention on the Recognition and Enforcement of

Foreign Arbitral Awards, controls arbitration disputes in the international context. In general, the Act creates a strong presumption in favor of arbitration, especially in international commercial agreements. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40 (1985); *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 519-20 (1974).

The present arbitration dispute clearly lies within the domain of chapter 2. Chapter 2 mandates that any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention. 9 U.S.C. § 202. Chapter 2 also stipulates that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203. De Méré and Jain are not United States citizens, and the relation between de Méré and Jain was commercial. Accordingly, Jain's suit meets chapter 2's jurisdictional requirements. *Cf. Sumitomo Corp. v. Parakopi Compania Maritima, S.A.*, 477 F.Supp. 737, 740-41 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980); *Andros Compania Maritima, S.A. v. Andre & Cie., S.A.*, 430 F.Supp. 88, 90 (S.D.N.Y. 1977); *Antco Shipping Co., Ltd. v. Sidermar S.p.A.*, 417 F.Supp. 207, 215-17 (S.D.N.Y. 1976). Jurisdiction in this case also rests solely on chapter 2. Because they are both foreigners, Jain and de Méré are not diverse parties for the purposes of 28 U.S.C. § 1332, and Jain's royalty claim raises no federal question beyond arbitration. Chapter 2 thus demarcates the beginning and the end of our authority in this case.

Both Jain and de Méré concede that we cannot refer this matter to arbitration unless the district court has the authority to order arbitration to proceed in a particular place.[1] Chapter 2 offers two potential statutory bases for compelling arbitration in this case. First, § 206 provides that any court with jurisdiction under chapter 2 "may direct that arbitration be held in accordance with the agreement at any place therein provided for; whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement." 9 U.S.C. § 206. Because the contract between Jain and de Méré does not identify an arbitration site, § 206 does not allow a court to grant Jain's motion to compel arbitration. *See Bauhinia Corp. v. China Nat. Machinery & Equipment Import & Export Corp.*, 819 F.2d 247, 250 (9th Cir. 1987).

Second, § 208 indicates that "Chapter 1 applies to actions and proceedings brought under [chapter 2] to the extent that [chapter 1] is not in conflict with this chapter or the Convention as ratified by the United States."

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[1] We are not faced with a situation like that in *Matter of U.S. Lines, Inc. and Liverpool and London S.S. Protection and Indem. Ass'n, Ltd.*, 833 F.Supp. 350 (S.D.N.Y. 1993), in which the parties had not specified a venue in their arbitration contract but had agreed that, if they could not agree to an arbitrator, the President of the Law Society of England would designate one. The court held that the arbitration agreement had rendered the choice of venue "itself a proper issue for resolution by arbitration." *Id.* at 353. Assuming the propriety of this decision, no equivalent provision in the instant case exists that would make it improper for a district court to select an arbitration venue. That French law will govern the arbitration between de Méré and Jain does not dictate what site for arbitration to choose or how an arbitrator should be selected.

Chapter 1, which contains the general provisions regarding arbitration, allows that:

> A party aggrieved by the alleged failure, neglect, or refusal of another party to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

9 U.S.C. § 4. In contrast to § 206, § 4 not only permits but requires a court to compel arbitration in its own district when no other forum is specified. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, No. 94-2297, slip op. at 8-9 (7th Cir. March 1, 1995); *Snyder v. Smith*, 736 F.2d 409, 419-20 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984). Indeed, a district court compelling arbitration under § 4 lacks the power to order arbitration to proceed outside its district. *Snyder*, 736 F.2d at 418. Thus, the court may only refer the case to arbitration in the Northern District of Illinois if § 4 applies.

Without question, chapter 2 incorporates § 4 to some degree. Where an arbitration agreement specifies an arbitration site, § 4 is admittedly incompatible with

chapter 2. If the agreement calls for arbitration within the district in which the action is brought, both § 4 and § 206 permit the court to compel arbitration there; section 4 is at most redundant. If the agreement calls for arbitration outside of the district in which the action is brought, the limits of § 4 directly conflict with the district court's powers under § 206, and § 208 would render § 4 inapplicable.

Where, however, an arbitration agreement contains no provision for location, § 4 would supplement § 206 by giving a court the ability to compel arbitration in its own district. Under this circumstance, § 4 and § 206 conflict only if one assumes that Congress intended § 206 to be the exclusive method by which courts could order arbitration. But if § 206 were exclusive, courts would have less power to enforce arbitration agreements in international cases than in domestic ones whenever the agreement failed to stipulate an arbitration location. Chapter 2, by implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was designed to increase the ability of district courts to compel arbitration in international commercial cases, and § 208 reflects that policy. *See Allied-Bruce*, 115 S.Ct. at 839; *Scherk*, 417 U.S. at 520. Given that purpose, the absence of any explicit statement making § 206 exclusive, and the strong presumption in favor of arbitration in the sphere of private international law, *see Mitsubishi Motors*, 473 U.S. at 631; *Scherk*, 417 U.S. at 517, we conclude § 4 is clearly applicable when an arbitration agreement fails to specify a place for arbitration.

The question then becomes *how* § 4 applies. Jain asserts that § 4 plainly states that when the district court determines that the parties have agreed to arbitrate a dispute, "the court shall make an order directing

the parties to proceed to arbitration in accordance with the terms of the agreement[,]" and such arbitration "shall be within the district in which the petition for an order directing such arbitration is filed." Thus, Jain concludes, the district court should order arbitration in the Northern District of Illinois. De Méré replies that § 4 is inapplicable to this case on its own terms. He points out that the first sentence of § 4 allows a court to compel arbitration only where a court has jurisdiction over the subject matter of the case independent of any arbitration agreement. As noted earlier, Jain's place in federal court depends entirely on his arbitration contract with de Méré. Therefore, de Méré argues, the court cannot compel arbitration under § 4 and properly denied Jain's motion.

The case law on the topic is sparse. Jain points to several decisions, primarily *Oil Basins Ltd. v. Broken Hill Proprietary Co.*, 613 F.Supp. 483 (S.D.N.Y. 1985), that resolve the matter in his favor. In *Oil Basins*, Oil Basins, a Bermudian corporation, moved to compel BHP, an Australian corporation, to arbitration over a disagreement regarding BHP's deduction of certain costs from royalty payments made to Oil Basins. BHP agreed that the dispute should be arbitrated but objected to the location: Oil Basins sought arbitration in New York, while BHP contended that arbitration should occur in Australia. As in the instant case, the parties had failed to specify a location for arbitration in their agreement. The *Oil Basins* court noted that neither § 4 nor § 206 permitted it to compel arbitration outside its own district. *Id.* at 487. The court assumed, however, that it had the authority to compel arbitration in its own district, the Southern District of New York, under § 4 in the absence of any agreement to arbitrate elsewhere and ordered arbitration

there.[2] Other courts, all citing *Oil Basins*, have reached similar conclusions. *See Bauhinia Corp.*, 819 F.2d at 249-50; *Circus Productions, Inc. v. Rosgoscirc*, 1993 WL 403993 (S.D.N.Y. October 5, 1993); *Tolaram Fibers, Inc., v. Deutsche Engineering der Voest-Alpine Industrieanlagenbau, GmbH*, 1991 WL 41772 (M.D.N.C. February 26, 1991); *Capitol Converting Co. v. Curioni*, 1989 WL 152832 (N.D.Ill. November 9, 1989).

As de Méré points out, in all of the chapter 2 cases involving § 4 motions to compel arbitration in the absence of a clause identifying the prospective arbitration site, save *Oil Basins*, there was actually diversity of citizenship cognizable under 28 U.S.C. § 1332. *See Bauhinia*, 819 F.2d at 248 (California plaintiff, Chinese defendant); *Rosgoscirc* (Russian plaintiff, New York defendant); *Tolaram Fibers* (North Carolina plaintiff, German defendant); *Capitol Converting* (Illinois plaintiff, Italian defendant); *see also Sembawang Shipyard, Ltd. v. Charger, Inc.*, 955 F.2d 983 (5th Cir. 1992) (admiralty jurisdiction). *Oil Basins* does present a scenario almost identical to the instant case. Yet in *Oil Basins*, as in these other cases, the defendants sought an expansive reading of § 206 rather than a restrictive reading of § 4. Both parties in *Oil Basins* wanted the court to compel arbitration, and it was only a matter of where that arbitration should occur. *Oil Basins*, therefore, did not directly address the issue de Méré raises. Moreover, language in a number of cases seems to support de Méré's argument by suggesting that specifying a location for arbitration in a state that has adopted the Convention is a prerequisite for

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[2] On a motion to reopen, the court subsequently dismissed the order to arbitrate in New York on grounds of *forum non conveniens*. *Oil Basins*, 613 F.Supp. at 488-91.

compelling arbitration pursuant to chapter 2. *See, e.g., Sedco v. Petroleos Mexicanos Mexican Nat'l Oil*, 767 F.2d 1140, 1145 (5th Cir. 1985); *Ledee v. Ceramichie Ragno*, 684 F.2d 184, 186 (1st Cir. 1982).

De Méré's position has some plausibility but is ultimately unconvincing. Section 208 requires the incorporation of chapter 1 provisions to the extent they do not conflict with chapter 2 or the Convention, and the jurisdictional restrictions of § 4 appear to conflict with jurisdictional grants of §§ 202 and 203 in international commercial arbitration disputes. Consequently, while the provision of § 4 allowing a court to order arbitration in its own district should apply to an action under chapter 2, its jurisdictional limits should not.

Other considerations also counsel the propriety of our conclusion. The jurisdictional requirement in § 4 ostensibly prevents the federalization of a vast number of arbitration disputes that were ordinarily the domain of state courts. This federalism concern has little force where Congress has otherwise determined that international commercial arbitration agreements are appropriate matters for federal courts. Moreover, compelling arbitration in cases like the present one better comports with the language of the Convention itself. Article II(3) of the Convention states that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed." Given that the court is properly seized of this action, it should not then be left helpless to enforce the arbitration agreement. Finally, we note that under de Méré's argument, a federal court would have less power to compel arbitration under an international

agreement than a state court. Jain could have filed suit in an Illinois state court based on the location of the royalty payments. De Méré, however, could then have removed the case to federal court under chapter 2's removal provision, 9 U.S.C. § 205. Once in federal court, under de Méré's reasoning, he could move to dismiss the case, as he has done here, whereas no such limit would necessarily apply in state court. *See, e.g.*, 710 ILCS 5/1 and 5/2 (allowing Illinois courts to compel arbitration where the court finds a binding agreement).

The same analysis we have applied to the district court's ability to order arbitration under § 4 applies to its ability to appoint an arbitrator under 9 U.S.C. § 5. Section 5 stipulates that "if no method be provided" in the arbitration agreement for the appointment of an arbitrator, "then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the agreement with the same force and effect as if he or they had been specifically named therein." Although § 206 states that the court "may appoint arbtrators in accordance with the provisions of the agreement," such a power does not prevent the court from naming an arbitrator where an arbitration agreement leaves that issue unaddressed; section 5 in no way conflicts with § 206 on this point. Accordingly, we hold that the district court also has the power to appoint an arbitrator in this case. *Cf. Euro-Mec Import, Inc. v. Pantrem & C., S.p.A.*, 1992 WL 350211 (E.D.Pa. November 16, 1992).

Last, it is important to note what is not at issue in this case. De Méré has not asserted that the district court lacked personal jurisdiction. *Cf. Borden, Inc. v. Meiji Milk Products Co., Ltd.*, 919 F.2d 822, 827 (2d Cir. 1990) (noting that a party "did not submit to the jurisdiction"

of a court "simply by agreeing to be bound by *arbitration* that might or might not" occur in that forum), *cert. denied*, 500 U.S. 953 (1991). Even if de Méré could have argued that he had never availed himself of anything in the Northern District of Illinois, *see Asahi Metal Ind. v. Superior Ct. of California, Solano Cty.*, 480 U.S. 102, 113-14 (1987), the time for making such an argument has passed. *See* Fed. R. Civ. P. 12(h)(1). Similarly, de Méré has not protested service of process. *Cf. In the Matter of Ferrara S.p.A.*, 441 F.Supp. 778 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). Nor has De Méré moved for dismissal on grounds of *forum non conveniens*, another reason for which district courts may dismiss a petition to compel arbitration. *Maria Victoria Naviera, S.A. v. Cementos del Valle, S.A.*, 759 F.2d 1027, 1031 (2d Cir. 1985); *see also Acton Corp. v. Borden, Inc.*, 670 F.2d 377, 382-83 (1st Cir. 1982); *Oil Basins*, 613 F.Supp. at 488. Finally, de Méré has not claimed that the agreement to arbitrate is an unenforceable nullity incapable of being performed. Convention, Art.II(3); *see Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477-79 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1294 (1992); *Ledee*, 684 F.2d at 187; *Beromun Aktiengesellschaft v. Societa Industriale Agricola "Tresse" di Dr. Domenico e Dr. Antonia dal Ferro*, 471 F.Supp. 1163 (S.D.N.Y. 1979). We pass judgment on the merits of none of these possible arguments.

In light of what is not at issue, the limited impact of our decision becomes clear. One foreign party can compel another foreign party to arbitrate in the United States only where the second party has expressly consented to a United States forum or has contacts with that forum sufficient to meet the requirements of personal jurisdiction. There will be no vast migration of foreign arbitration disputes to the United States, as de Méré prophe-

cies, unless the defendant is already in some way connected to this country. Even in that event, the defendant may still invoke *forum non conveniens* arguments. To the extent future parties wish to avoid the uncertainty of leaving the forum question open, they can always specify the location of arbitration and the method of selecting an arbitrator in their initial agreement.

For the foregoing reasons, the decision of the district court is reversed and the case remanded.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED SEPTEMBER 2, 1994 DENYING MOTION FOR RECONSIDERATION

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge: *JAMES B. ZAGEL*

Case Number: *94 C 3388*

Date: *September 2, 1994*

Case Title: *JAIN V. COURIER de MERE*

* * *

DOCKET ENTRY:

Status hearing *held*

Motion for reconsideration is denied for the reasons stated in open court.

No notices required, advised in open court.

courtroom deputy's initials: *Du*

docketing dpty. initials: *illegible*

APPENDIX E — TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION ON SEPTEMBER 2, 1994, RELATIVE TO THE MOTION FOR RECONSIDERATION

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 94 C 3388

ISWAR D. JAIN,

Plaintiff,

v.

HENRI COURIER DE MERE,

Defendant.

Chicago, Illinois
September 2, 1994
10:15 a.m.
Motion Hearing

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

For the Plaintiff: KECK, MAHIN & CATE, by
MS. CATHERINE A.T. NELSON
77 West Wacker Drive
Suite 4900
Chicago, Illinois 60601

Appendix E

For the Defendant: BATLER & SCHWARTZ, by
MR. DANIEL A. WOLF
355 West Dundee Road
Suite 200
Buffalo Grove, Illinois 60089

Court Reporter: Wanda L. Barnes
Official Court Reporter
219 South Dearborn Street
Suite 1918
Chicago, Illinois 60604
312 435-5568

THE CLERK: 94 C 3388, Jain v. Courier de Mere.

MR. WOLF: Opposing counsel is here, Your Honor. I think she's outside.

THE COURT: Okay

THE CLERK: State your name for the record.

MR. WOLF: Daniel Wolf for Henri Courier de Mere.

THE COURT: Well, I suppose it's right that you're here, because you're going to be a little happier with what I'm going to say.

Oh.

MS. NELSON: I apologize, Your Honor.

THE COURT: That's okay.

MS. NELSON: Catherine Nelson on behalf of the movant.

THE COURT: I have before me a motion to reconsider my prior ruling.

Chapter 2 of the Arbitration Act states that Chapter 1 applies to all proceedings brought under Chapter 2 "to the extent that chapter is not in conflict with this chapter or the Convention." That's Section 208 of Chapter 9 of the U.S. Code.

Chapter 1 authorizes the court to compel arbitration within the district, and only within the district. Chapter 2 permits the court to compel arbitration, quote, "in accordance with the arbitration agreement at any place therein provided for," closed quote. That's Section 206 of 9 U.S.C.

Jain argues that the latter provision is inclusive rather than exclusive and therefore does not conflict with the former. He cites two cases supporting his position, one from the Ninth Circuit, citing Oil Basins Ltd. v. Broken Hill Proprietary Company, which is Judge Cannella's opinion in the Southern District of New York.

I am troubled by Jain's argument despite the precedent in his favor. The same section of Chapter 1 authorizes a court to compel arbitration in its own district, also predicates authority to compel arbitration at all and having jurisdiction over the underlying dispute. Jain has never even attempted to demonstrate that here.

It seems to me that Section 206 allowing the court to compel arbitration at a place within the scope of the agreement goes hand-in-hand with the broader grant of jurisdiction in Chapter 2.

Appendix E

Jain's construction of the act means there were two foreign citizens that made no agreement regarding the arbitration site. One party may walk into a U.S. district court, regardless of that court's lack of jurisdiction over the underlying dispute, and obtain arbitration in that district. This just seems a little too nice. It skirts both the jurisdictional requirements of Chapter 1 and the limited authority granted in Chapter 2.

The State Department apparently drafted this legislation and submitted it to the Speaker of the House. Oil Basins, the opinion relies on a letter from the State Department that is included in the very brief House Report accompanying the bill. The letter states that what is now Section 206 is permissive rather than mandatory ("inclusive rather than exclusive" would be more correct) because, quoting from the letter, "there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought," closed quote.

Those who believe in "text first" might think the statute was sufficiently clear that legislative history should not come into play. Moreover, the letter does not really resolve the issue before me. It says "there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought." This is, I suppose, an indisputable statement, but it is not clear whether the writer is assuming jurisdiction over the underlying dispute, which is the question before me.

In the Ninth Circuit case Bauhinia the district court did have jurisdiction over the underlying dispute. The Chinese defendant moved to compel arbitration after the plaintiff California corporation filed a suit for breach of contract. The court did not refer to this as a basis of its decision, but the distinction leaves Jain, I think, with Oil Basins as the only case clearly in its favor.

In Oil Basins, however, the court did not select the arbitrators, presumably because the only open issue was where to arbitrate, not who. The court compelled arbitration in New York, but noted that it would entertain a motion to reconsider if the arbitrators determined that the proceedings would best be conducted in Australia. But apparently before submitting to arbitration respondent filed a 60(b) motion seeking dismissal on grounds of foreign forum nonconvenience. The court granted the motion and dismissed the case.

In a subsequent case where the parties had specified how to select arbitrators, but not where to arbitrate, Judge Kimba Wood found the arbitration site within the scope of the arbitrable issues and referred it to the arbitrator. Unlike those cases, we are asked to select an arbitrator and a site for arbitration.

There are many courts which speak of the strong federal policy favoring arbitration and say that doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. But is this dispute really about the scope of arbitrable issues? I think it is not. I think it is about the enforceability of an arbitration agreement under Chapter 2, an issue that presents statutory rather than contract interpretation, and I adhere to my prior statutory interpretation.

The petition for reconsideration is denied.

Thank you, counsel.

MS. NELSON: Will we be — I'm sorry, Your Honor. I wasn't here at the initial portion of your ruling. Will we receive this —

Appendix E

THE COURT: No.

MS. NELSON: — in writing?

THE COURT: The minute order will read for the reasons stated in open court the petition far reconsideration is denied.

* * * * * * * * * * * *

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

s/ Wanda L. Barnes	9/9/94
Official Court Reporter	Date

APPENDIX F — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AUGUST 22, 1994 RELATIVE TO THE MOTION TO APPOINT ARBITRATOR AND TO COMPEL ARBITRATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 94 C 3388

THE HONORABLE JAMES B. ZAGEL

IN THE MATTER OF
ISWAR D. JAIN,

Petitioner,

v.

HENRI COURIER DE MERE

Respondent.

MEMORANDUM OPINION AND ORDER

Henri Courier de Mere, a citizen and resident of France, owns patents pertaining to certain electronic ballasts for fluorescent and gas discharge lamps. He and Ishwar D. Jain, a citizen and resident of India, executed a written Agreement providing that Jain would assist de Mere in marketing the inventions and negotiating licenses, for which Jain would receive ten percent of all amounts received by de Mere. Jain accuses de Mere of wrongfully withholding his share of an advance royalty payment de Mere received pursuant to a license agreement that

Jain allegedly negotiated with Motorola Lighting, Inc. Their Agreement provides for dispute resolution by an arbitration commission applying French law.

Jain served de Mere with a demand for arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The AAA designated Rodolphe J.A. de Seife as arbitrator, but de Mere contended that the only competent jurisdiction lies in France, and that, to the extent that the parties disagree over the appointment of an arbitrator, that dispute, coupled with the Agreement's failure to specify an appointment method, terminates the arbitration provision according to French law. Jain, therefore, has petitioned this court for an order appointing Rodolphe J.A. de Seife as arbitrator and compelling arbitration.

Chapter 2 of the Federal Arbitration Act provides for enforcement within the United States of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 USC § 201. As its name suggests, the Convention focuses primarily on the enforcement of arbitration awards, but it also obliges courts of contracting states to compel arbitration "when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement within the meaning of this article." Convention, Art II, ¶ 3 (reprinted at 9 USCA § 201 notes (West, Supp 1994). The Act endows federal courts with jurisdiction over any "action or proceeding falling under the Convention." 9 USC § 203. However, while specifying when "[a]n arbitration agreement or arbitral award . . . falls under the Convention," 9 USC § 202, the Act does not specify when an "action or proceeding" does.

To fill this gap in the statute, de Mere focuses on Article II(3)

of the Convention. He argues that, by limiting judicial authority to cases where the court is "seized of an action in a matter in respect of which the parties have made an [arbitration] agreement," the Convention predicates authority to compel arbitration on the court's jurisdiction over the underlying dispute. Thus, the argument goes, just as Congress provided that an arbitration agreement alone could not justify venue, 9 USC § 204, so the Convention drafters provided that an arbitration agreement alone could not confer jurisdiction, but can be enforced only where the underlying dispute is properly before the court.

The argument has some initial appeal, but it is wrong. A petition to compel arbitration is "an action in a matter in respect of which the parties have made an [arbitration] agreement." "Action" and "matter" cannot be read as synonyms here. The Petition to Compel Arbitration is a legal action in the matter of Jain's contractual dispute with de Mere. The court is properly seized of that action because it arises from an arbitration agreement that falls under the Convention.

De Mere notes that unless Article II(3) is read as he suggests, a complainant armed with an arbitration agreement affecting international commerce could bring an action to compel arbitration in any of the Convention's contracting states, even where the forum lacks any relation to the parties or the underlying matter. Of course, this is so only because de Mere and Jain did not specify a forum for resolving such disputes.[1] Moreover, such a result does not offend policies underlying the Convention or the Arbitration Act:

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1. See *Scherk v Alberto-Culver Co.*, 417 US 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit, but also the procedure to be used in resolving the dispute.").

Appendix F

> [t]he goal of the Convention, and the principal purpose underlying American option and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v Alberto-Culver Co., 417 US 506, 520 n 15 (1974). The goals of encouraging enforcement and unifying standards seems well-served by allowing the complaining party to seek enforcement from a forum that presents the fewest practical, political, and legal obstacles, at least when the parties have specified neither a forum nor a method for resolving disputes regarding enforcement and the appointment of arbitrators.

De Mere claims to have found no federal case in which a Petition to Compel Arbitration was, by itself, the original cause of action. But in *Antco Shipping Co. v Sidermar*, 417 F Supp 207 (S D NY 1976) the only actions before the court were a Bahamian charterer's petition for a stay of arbitration and an Italian shipowner's cross-petition to compel arbitration. Judge Haight found that he had jurisdiction, under Chapter 2 of the Arbitration Act, to enforce the parties' arbitration agreement. Id at 215-17. The court was not seized of the underlying contractual dispute; the only issue before it was whether to enjoin or compel arbitration. See also *Matter of Ferrara*, 441 F Supp 778 (S D NY 1977) (similar).

On the other hand, while Chapter 2 does confer jurisdiction, it does not permit me to compel arbitration in this case. Chapter 2

permits courts to compel arbitration only "in accordance with the [arbitration] agreement at any place therein provided for." 9 USC § 206. The agreement between Jain and de Mere contains no such provision and, therefore, cannot be enforced under Chapter 2. See *Ledee v Ceramichie Ragno,* 684 F2d 184, 186 (1st Cir 1982) (arbitration may not be compelled unless the parties' agreement provides for arbitration within the territory of a contracting state); *Sedco v Petroleos Mexicanos Mexican Nat'l Oil,* 767 F2d 1140, 1145 (5th Cir 1985) (same); *Marchetto v DeKalb Genetics Corp.,* 711 F Supp 936, 939 (N D Ill 1989) (same). As for Chapter 1, it applies to a narrower range of commerce than Chapter 2. Compare 9 USC § 1 to 9 USC § 202.

Enforcement of arbitration agreements under Chapter 1 does not require prior specification of the arbitration site, 9 USC § 5, but Chapter 1 limits the power to compel arbitration to cases where the court has an independent basis for jurisdiction "in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties," 9 USC § 4. None has been established here. There is certainly not diversity; foreign citizens who reside abroad are not diverse for jurisdictional purposes.

Appendix F

Conclusion

The arbitration agreement between Jain and de Mere is unenforceable under Chapter 2 of the Arbitration Act, and I have no jurisdiction to enforce it under Chapter 1. The petition to compel arbitration is denied.

Enter:

s/ James B. Zagel
James B. Zagel
United States District Judge

Date: Aug. 22, 1994

Appendix F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

CASE NUMBER: 94 C 3388
Judge Zagel

ISWAR D. JAIN,

Petitioner

v.

HENRI COURIER DE MERE,

Respondent

JUDGMENT IN A CIVIL CASE

❑ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, petitioner's motion appoint arbitrator and to compel arbitration is denied.

August 22, 1994
Date

H. STUART CUNNINGHAM
Clerk

s/ Don Walker
(By) Deputy Clerk

APPENDIX G — RELEVANT STATUTES INVOLVED

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that

there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263 § 19, 68 Stat. 1233.

9 U.S.C. § 203. Jurisdiction; amount in controversy.

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

9 U.S.C. § 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place

therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

9 U.S.C. § 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States. (Added Pub. L. 91-368, § 1, July 31, 1970, 84 Stat. 693).

Supreme Court, U.S.
FILED
SEP 1 1995
CLERK

No. 95-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HENRI COURIER DE MERE,

Petitioner,

v.

ISHWAR D. JAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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15 pp

QUESTION PRESENTED

When presented with a petition to compel arbitration between two foreign parties under Chapter 2 of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, does a United States District Court have authority to compel arbitration within its own district and appoint an arbitrator, if the parties' arbitration agreement does not specify a location for arbitration or a method for appointing an arbitrator and the district court's subject matter jurisdiction arises solely under § 203 of the Federal Arbitration Act?

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Respondent, Ishwar D. Jain, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 51 F.3d 686 (7th Cir. 1995).

STATEMENT OF THE CASE

Respondent Ishwar D. Jain ("Jain") is a citizen of India who currently resides in New Delhi, India. Petitioner, Henri Courier de Mere ("de Mere") is a citizen of France. de Mere is the inventor and owner of certain patents pertaining to electronic ballasts for gas discharge lamps such as fluorescent lamps.

On November 12, 1992, the parties entered into a written agreement providing, in part, that Jain assist de Mere in marketing his inventions and negotiating license agreements on a worldwide basis. ("Agreement"). The Agreement initially was negotiated in Germany, Switzerland, Malta and India and was executed, in its final form, in Mettray, France. In consideration for Jain's efforts, the Agreement provides that Jain receive 10% of all amounts received by de Mere.

In performance of the Agreement, Jain promoted and negotiated a license agreement between de Mere and Motorola Lighting, Inc. of Buffalo Grove, Illinois ("Motorola"). These negotiations took place in Illinois and required the presence of both Jain and de Mere in the Northern District of Illinois for a period of over five months. As a result of Jain's efforts, de Mere and Motorola entered into a license agreement on August 25, 1993 whereby de Mere was paid an advanced royalty payment according to the following schedule:

1. $250,000 within seven days of the execution of the agreement;
2. $250,000 by 12/31/93; and
3. $500,000 upon initial shipment of product but not later than July 1, 1994

("Motorola Agreement"). The Motorola Agreement further provided for ongoing royalty payments for subsequent sales of the licensed product.

In accordance with the Agreement, de Mere compensated Jain 10% of the first advanced royalty payment, or $25,000. Subsequently, however, de Mere refused to compensate Jain 10% of the December 31, 1993 payment as provided for by the Agreement. de Mere has refused to pay any further royalty payments called for by the Agreement.

Paragraph 10 of the Agreement contains a provision whereby the parties agree to arbitrate any disagreement arising out of the contract. This provision states:

> Any disagreement arising out of this contract may only be presented to an arbitrary commission applying the French laws.

The provision is silent as to the location of the arbitration or the method of appointment of the arbitrator.

On March 18, 1994, Jain delivered to de Mere a Demand for Arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The AAA designated an arbitrator and scheduled a hearing for July 25-26, 1994. de Mere, however, refused to participate in any arbitration in the Northern District of Illinois.

On June 1, 1994, Jain filed a Petition to Appoint Arbitrator and Compel Arbitration in the Northern District of Illinois. Judge Zagel issued a Memorandum Opinion and Order on August 22, 1994 denying Jain's Petition. Although finding that jurisdiction in the United States Federal District Court was appropriate pursuant to Chapter 2 of the Federal Arbitration Act ("FAA"), the District Court ruled that Chapter 2 of the FAA does not permit it to compel arbitration in this case. Specifically, the Court found that while Chapter 1 allows a district court to compel arbitration within its district, Chapter 2, § 206 permits courts to compel arbitration only in accordance with the arbitration agreement at any place therein provided for. As the arbitration agreement in this case does not specify a location for the arbitration, the Court concluded that it could not compel arbitration.

On August 26, 1994, Jain filed a Motion for Reconsideration based on § 208 of the FAA which incorporates the

provisions of Chapter 1 into Chapter 2. On September 2, 1994, although acknowledging the precedent in favor of Jain's petition to compel arbitration and appoint arbitrator, Judge Zagel denied Jain's motion for reconsideration. Specifically, Zagel ruled that the authority of § 206 is limited and that § 206 requires a location for arbitration and a method for the appointment of arbitrators be designated before a court could compel arbitration between foreign parties under the Convention. Judge Zagel held that a district court could compel arbitration in its own district using Chapter 1, § 4 only if a basis of jurisdiction *in addition* to that conferred by Chapter 2, § 203, existed.

On September 30, 1994, Jain appealed to the United States Court of Appeals for the Seventh Circuit which reversed the decision of the district court and remanded the case. The court of appeals held that the provision of § 4 allowing a court to order arbitration in its own district applies to an action under Chapter 2 and that no basis for subject matter jurisdiction beyond § 203 was necessary. The Court noted:

> Other considerations also counsel the propriety of our conclusion. The jurisdictional requirement in § 4 ostensibly prevents the federalization of a vast number of arbitration disputes that were ordinarily the domain of state courts. This federalism concern has little force where Congress has otherwise determined that international commercial arbitration agreements are appropriate matters for federal courts. Moreover, compelling arbitration in cases like the present one better comports with the language of the Convention itself. Article II(3) of the Convention states that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer

> the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed." Given that the court is properly seized of this action, it should not then be left helpless to enforce the arbitration agreement. Finally, we note that under de Mere's argument, a federal court would have less power to compel arbitration under an international agreement than a state court.

Jain v. de Mere, 51 F.3d 686, 691 (7th Cir. 1995).

On April 17, 1995, de Mere filed a Petition for Rehearing *In Banc* which was denied on May 5, 1995. The instant petition followed.

REASONS FOR DENYING THE WRIT

I.

The Seventh Circuit's Decision Does Not Conflict With That Of Any Other Circuit, Applicable Federal Statutes Or Federal Policy.

A well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court, some lower court whose judgment is final in the absence of Supreme Court review, or federal statute or policy. In the instant case there is no conflict, direct or otherwise, with a decision of another court of appeals, any other court, or with any federal statute or policy.

A. No Conflict Exists Between the Circuits.

The decision of the Court of Appeals of the Seventh Circuit in this case is in complete accord with the Ninth Circuit decision in *Bauhinia Corp. v. China Nat'l. Machinery & Equipment Import & Export Corp.*, 819 F.2d 247 (9th Cir. 1987). In *Bauhinia*, the Ninth Circuit, as

did the Seventh Circuit in the instant case, held that the provision of § 4 allowing a district court to compel arbitration in its own district applies to Chapter 2 where the arbitration agreement is silent as to location. 891 F.2d at 250. Indeed, all other courts dealing with this issue, primarily *Oil Basins, Ltd. v. Broken Hill Proprietary Co.*, 613 F. Supp. 483 (S.D.N.Y. 1985), have reached similar conclusions. In *Oil Basins* an international arbitration agreement governed by Chapter 2 of the FAA made no express provision as to location. As here, jurisdiction in *Oil Basins* was based on 28 U.S.C. § 1331 and 9 U.S.C. § 203—the international arbitration under Chapter 2 arose under the laws and treaties of the United States. 613 F. Supp. at 485. Therefore, the court compelled the arbitration to take place in its own district. *See also Rosgoscirc v. Circus Show Corp.*, 1993 U.S. Dist. LEXIS 9797 (S.D. N.Y.); *Tolaram Fibers, Inc. v. Deutsche Engineering der Voest-Alpine Industrieanlagenbau, GmbH*, 1991 U.S. Dist. LEXIS 3565 (M.D.N.C.); *Capitol Converting Co. v. Curioni*, 1989 U.S. Dist. LEXIS 13904 (N.D. Ill.).

Because no conflict exists between the instant decision of the Seventh Circuit and that of any other circuit or any other court, the petition should be denied.

B. No Conflict Exists Between the Seventh Circuit Decision and Federal Statute or Policy.

Moreover, the decision of the Court of Appeals for the Seventh Circuit does not conflict with the purpose of the Federal Arbitration Act ("FAA") or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), which Chapter 2 of the FAA implements.

In 1970, the United States became a party to the Convention which was designed to encourage the arbitration

of international commercial disputes and to unify the standards by which agreements are enforced. *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17, 94 S. Ct. 2449, 2455-56, 41 L. Ed. 2d 270 (1974). The purpose of Chapter 2 of the FAA is to implement this Convention. By acceding to the Convention, the United States joined other signatory nations in proclaiming a willingness to enforce arbitration clauses in international agreements. *Id.* at 516 n.10, 94 S. Ct. at 2451 n.10.

Despite this underlying policy in favor of arbitration, petitioner argues that Congress is presumed to be aware that it left one foreign party powerless to compel another foreign party to arbitrate in the United States where no location was designated and the district courts did not have an independent basis of jurisdiction beyond that granted to it by virtue of Chapter 2 of the FAA. In rejecting this argument the Court of Appeals for the Seventh Circuit recognized that:

> The jurisdictional requirement in Section 4 ostensibly prevents the federalization of a vast number of arbitration disputes that were ordinarily the domain of state courts. This federalism concern has little force where Congress has otherwise determined that international commercial arbitration agreements are appropriate matters for federal courts.

Thus, petitioner's theory that the independent jurisdictional requirements of Chapter 1, § 4 are a prerequisite to incorporating § 4 provisions into a Chapter 2 preceding is unpersuasive.

Moreover, in drafting Chapter 2, § 208 Congress mandated the application of Chapter 1 provisions to the extent they do not conflict with Chapter 2 or the Convention. The Court here found that the jurisdictional restrictions in § 4 conflict with the expansive jurisdictional grant set

out in §§ 202 and 203. For this reason alone, the conflicting jurisdictional restrictions of § 4 cannot be incorporated.

Further, compelling arbitration in cases like the present is the only logical result consistent with the language of the Convention itself. Article II(3) of the Convention states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed. (emphasis added)

Given that the Court is properly seized of this action, "it should not then be left helpless to enforce the arbitration agreement." 51 F.3d at 691. In fact, the Convention mandates that the district court refer the parties to arbitration. Failure to do so here because a location is not designated frustrates the essential purpose of the Convention.

Accordingly, as there is no conflict between the decision in the instant case and the applicable federal statute or policy, the petition should be denied.

II.

The Seventh Circuit's Decision Does Not Raise An Important Question Of Federal Law Which Merits Review By The United States Supreme Court.

As petitioner himself concedes, the decision of the Court of Appeals will affect few people and involve a limited number of cases. Petitioner states that the Court of Appeals "grossly overstates the perceived problem because it *only* arises in the specific instance where the agreement fails to stipulate an arbitration location *and*" where

the district court does not have an independent basis for jurisdiction beyond Chapter 2 of the FAA and the Convention. (emphasis added) Petition at 9. Petitioner admits this will probably only occur where the dispute involves entirely foreign parties and one seeks arbitration in the United States. As noted by the Court of Appeals, however, this will only occur where the second party has expressly consented to a United States forum or has contacts with that forum sufficient to meet the requirements of personal jurisdiction. Thus, as noted by the Court of Appeals, "the limited impact of our decision becomes clear." 51 F.3d at 692.

III.

The Seventh Circuit's Decision Does Not Depart From The Accepted And Usual Course Of Judicial Proceedings And Is Correct.

Chapter 2, § 208 of the FAA provides that Chapter 1 is incorporated into Chapter 2 "to the extent that [Chapter 1] is not in conflict with [Chapter 2] or the Convention. . ." 9 U.S.C. § 208. Thus, the only condition placed upon this incorporation is that the Chapter 1 provision not conflict with Chapter 2.

Chapter 2, § 206 states that a Court "may direct that the arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206. Chapter 1, § 4 requires that where an arbitration agreement is silent as to the location of the arbitration, a district court can order arbitration solely within its own district. 9 U.S.C. § 4. Under the plain language of the statute, § 4 does not and cannot conflict with Chapter 2 or the Convention unless the contract expressly specifies the location for the arbitration other than the forum district. *Bauhinia*, 819 F.2d 247; *Oil Basins*, 613 F. Supp.

483. Thus, the Court of Appeals did not, as de Mere suggests, rewrite § 208 of the FAA. Rather, the Court was entirely correct in holding that one foreign party can compel another foreign party to arbitrate in the United States where the second party has expressly consented to a United States forum or has contacts with the forum sufficient to meet the requirement of personal jurisdiction.

de Mere also argues that because Chapter 1, § 4 contains jurisdictional limits in addition to granting a district court authority to order arbitration within its own district, Congress intended those jurisdictional limits to be applicable to international arbitrations arising under Chapter 2 and the Convention. As previously stated, however, Congress also intended § 208 to incorporate Chapter 1 provisions into Chapter 2 to the extent that they do not conflict with Chapter 2 or the Convention. The provisions of § 4 embracing jurisdictional restrictions *do* conflict with the jurisdictional grants of §§ 202 and 203 in international commercial arbitration disputes. Section 203 provides an express grant of subject matter jurisdiction to federal courts over any action or proceeding falling under the Convention. 9 U.S.C. § 203. Thus, as held by the Court of Appeals for the Seventh Circuit, while the provisions of § 4 allowing a court to compel arbitration in its own district should apply to an action under Chapter 2, those provisions restricting jurisdiction should not.

Finally, the decision of the Court of Appeals in the instant case is the only decision which follows the mandate of the Convention to which the United States became a party. The Convention *requires* that the United States refer the parties to arbitration unless it finds that said Agreement is null and void, inoperative or incapable of being performed. No such argument has even been advanced by the Petitioner. Thus, failure to refer the parties

in this case to arbitration would frustrate the clear language of the Convention to which the United States has been a party for over 25 years.

CONCLUSION

For each of the reasons set forth herein, Respondent respectfully requests that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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